No. 4249

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

BEET GROWERS SUGAR COMPANY,
(a corporation), Defendant,
Plaintiff in Error

vs.

COLUMBIA TRUST COMPANY,
(a Corporation), Trustee, Plaintiff,
and
E. D. HASHIMOTO, Intervenor
and
A. V. SCOTT, Receiver,
Defendants in Error

REPLY BRIEF OF PLAINTIFF IN ERROR

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REPLY BRIEF OF PLAINTIFF IN ERROR

The brief filed by the Receiver contains several statements not warranted by the record and many of the conclusions drawn therefrom are erroneous. The cases cited, either do not uphold the contention of counsel for the appellee, or are easily distinguished from those cited by the appellant.

We desire briefly to direct the court's attention to these matters.

CONCERNING APPELLEE'S STATEMENT OF FACTS.

It is stated at Page 1 of the Appellee brief that "the complaint prayed for the appointment of a Receiver. In its answer the defendant consented to the appointment of a receiver." This statement is untrue. The answer of the Beet Growers Sugar Company prays "that the complaint herein be dismissed and that the plaintiff go hence without judgment; that the defendant have and recover its costs in this behalf expended, and that such decree be had in this case as will properly conserve and protect the interests of this answering defendant and its unsecured creditors." (Record, p. 31.)

It is true that the Trust Deed executed by the company provided that upon filing of a bill in equity the Trustee "shall be entitled to the appointment of the receiver of the property mortgaged and of the earnings, tolls, income, revenue, issues and profits thereof, with such power as the Court making such appointment shall confer." (Record, p. 19.)

Upon the complaint of the Trustee having been filed, the Court held that default had been made by the company and that the plaintiff was entitled to the appointment of a receiver. Notwithstanding the provisions contained in the trust deed, giving to the Trustee the right to ask for a receiver under certain conditions, the company did not waive its statutory right of redemption, nor did it authorize the receiver or the Court to order its property sold in the event of foreclosure without the equity of redemption.

The trust deed provides that when default is made

that the Trustee shall have the right to "declare the principal of all bonds secured and then outstanding to be and they shall thereupon immediately become due and payable, anything contained in the bonds or herein to the contrary notwithstanding, and *may proceed to foreclose this indenture and to enforce by legal process the payment of said bonds and coupons by and against the company.*" (Record, p. 16.) This gives the right of sale by foreclosure, but does not authorize a receiver's sale without this right.

In pretending to quote from the complaint in intervention it is stated on page 4 of the brief that "it was further alleged that since the appointment of the receiver that the board of directors of the corporation had ceased to function," and the impression is left by this statement that the corporation had in fact ceased its operations. This, however, is untrue. After the appointment of the receiver the officers of the company being temporarily out of funds and the receiver having failed to pay the corporation tax when due, the charter of the company temporarily lapsed, but the officers of the company on learning of the failure of the receiver to pay the tax, immediately paid to the Secretary of the State of Idaho the tax, and a certificate was promptly issued in accordance with the laws of that state, reinstating the corporation.

That was the basis of this charge, and while it was contended by the intervenor that the corporation had ceased to function and that the State of Idaho had no right or authority to reinstate the corporation, Judge Dietrich promptly overruled the objection urged by the

intervenor, and held that the company was in existence, and at all times thereafter recognized the company and the efforts of its officials in endeavoring to preserve the corporate assets, pay its obligations, and redeem its property. So that the suggestion made that the corporation "had ceased to function" comes with poor grace from the receiver at this time, and has nothing whatever to do with the matters in issue.

Again, the brief quotes a paragraph from the complaint in intervention to the effect that a portion of the bonds of the company had been "wrongfully taken by officers of the company, who hold the same to protect and secure their personal claims against the defendant."

Why this matter should be injected in the proceedings at this time, we are unable to understand. No evidence was ever offered in support of this allegation and no finding was ever made sustaining it, but, upon the contrary, all the acts of the officers of the corporation were by the Court upheld.

It is true that it was ordered that the complaint in intervention be taken *pro confesso,* but this was done through inadvertence and the Court immediately thereafter permitted and allowed the defendant to file its answer to the petition of the intervenor, wherein he asked that all of the assets of the company be sold "as a single unit, but sold without right of redemption." (Record, p. 61.)

The answer denied "that the property of the defendant described in the trust deed under foreclosure was in any sense a public or a quasi-public utility or anything more than a private enterprise." (Record, p. 61.)

The answer set forth fully the nature of the corporation, the purposes for which it was organized, that it had 2,173 stockholders, 72% of whom were farmers; that the total amount of its preferred capital stock issued and outstanding for which cash had been paid was $1,160,050. That efforts were being made to re-finance the corporation; that while this property was worth more than $1,333,200., that the total indebtedness of the company did not exceed $600,000. and that the acts of the intervenor was for the sole purpose of hindering and preventing the refinancing of the company and the payment of its obligations, and asked that the order sought by the intervenor be denied and that the petition be dismissed.

In other words at the first suggestion of the Intervenor, that the company's property be sold without the right of redemption, the company filed an answer and made proper objections thereto. (Record, pp. 61 to 74.)

As soon as the Trustee filed an amendment to its complaint asking for a decree authorizing the sale of the company's property without the right of redemption, (p. 26), the defendant company immediately filed its answer to the amendment to the bill of complaint, and prayed that the relief sought by the plaintiff under its amendment to the bill of complaint, to-wit: that "the sale of the property of the defendant without the right of redemption" be denied, and that in case of judgment or foreclosure that the decree and order provide for the right of redemption pursuant to the laws of the State of Idaho." (Record, p. 34.)

We direct the Court's attention to these matters, simply for the purpose of showing that the appellant was

at all times insisting upon its right of redemption guaranteed under the laws of Idaho.

Counsel, on page 7 of their brief, quote a part of a statement made by the Court under date of December 28, 1923, wherein it is stated—

> "that it is apparent that the common stockholders and the company, in so far as it represents only the common stockholders, have no real interest in the question of whether the sale be made with or without redemption."

This is from a memorandum decision of the Court; in other words, a mere suggestion as to what the Court's views were. But the quotation as given is wholly misleading and was injected into the brief undoubtedly for the purpose of conveying the idea that Judge Dietrich had at that time decided against allowing a sale of the property with the right of redemption. The Court then had under consideration various claims presented against the company, as well as the question of the sale of the property, and in discussing generally the conditions of the company, the standing of the preferred and common stockholders, and the amount of the unsecured claims, finally comes to a discussion as to "whether or not the property should be sold with redemption," and said this question has

> "given rise to a very earnest controversy, and upon it elaborate arguments have been submitted. All of the property, real and personal, purports to be covered by the Trust Deed, and as all of it is used together to carry on a single enterprise, and substantially all of it is essential to the successful operation of the plant. Comparatively speaking, the personal property is of small value."

It is then suggested that the Trustee and intervenor urged a sale without redemption and then directed attention to the fact that the unsecured creditors were not directly represented. The Court then continues:

> "The Sugar Company strongly opposes such a sale and argues, in the first place, that it cannot be legally made."

This is followed by a discussion of the value of the property and that if the property did not sell for an amount greater than that suggested, that then it would be "apparent that the common stockholders, and the company in so far as it represents only the common stockholders, have no real interest in the question of whether the sale is made with or without redemption."

The Court, however, not being satisfied with the evidence then before it, concluded that before it could intelligently draft a proper order of sale that he deemed it necessary to have a conference with counsel and a supplemental hearing. Such a conference and hearing was accordingly fixed for January 7, 1924, at 2 p. m., at the courtroom in Pocatello. (Record, p. 94.)

It will thus be observed that at the time of the announced memorandum decision, under date of December 28, 1923, the Court had not definitely decided the question of sale, and fixed a supplemental hearing for January 7th. Up until this time the trustee and intervenor had been urging the sale of the property without the right of redemption.

On January 7th, however, additional evidence was taken, at which time the trustee and intervenor still collusively acting together against the interests of the

company, called as a witness H. A. Benning. (Record, p. 225). He was formerly connected with the Amalgamated Sugar Company (one of the companies found guilty of conspiracy against the Beet Growers Sugar Company by the Federal Trade Commission), but at that time was interested in the lease upon the Beet Growers Sugar Company's property. He attempted to minimize the value of the property and claimed that it was worth only from $450,000 to $500,000.

Yet upon cross examination he admitted that he did not know what the plant cost or the number of acres of beets the company was able to contract for. It was conclusively demonstrated that this witness had no actual knowledge of the real value of the property.

The supplemental hearing was not concluded on January 7th, but was resumed January 8th. (Record, p. 230.)

At the time Mr. Story, who had represented the trustee in all of the proceedings, stated:

> "Your honor, I would like to make a suggestion or two. Since yesterday's session I have given the matter a good deal of thought. * * * * I suggested to Your Honor yesterday that I thought under the facts as you had found them in your memorandum opinion, even a sale under foreclosure would give the plaintiff the right to have the sale made without redemption. So far as we are concerned, we feel that the immediate sale of the property is of very much more importance than the question of redemption. If the property can be sold under foreclosure at this time without endangering the possibility of the sale being voided by fixing some large upset price, we would be very glad to have it sold in foreclosure with the equity of redemption allowed by law, and *we withdraw our request for the sale without redemption.* (Record, p. 231.)

It must be remembered that the trustee began the foreclosure proceedings, asked for the appointment of a receiver, and later petitioned to have the property sold without the equity of redemption. Before, however, such a decree was entered, the trustee withdrew his request for the sale without redemption. In other words, in open court, the trustee voluntarily changed the prayer of his petition and consented to the sale of the property with the equity of redemption provided by the laws of Idaho.

It must be remembered that it was the trustee that was enforcing its rights under the trust deed. The intervenor had joined the trustee in asking for the sale without the equity of redemption, but at the hearing on January 7th and 8th, Mr. Johnson, one of the counsel for the intervenor, after Mr. Story had withdrawn the trustee's request for the sale without the equity of redemption, joined Mr. Story in withdrawing the request for such a sale. He suggested that the property be preserved as a unit and that the real and personal property be not segregated, but sold and redeemed as a unit.

Thereupon Mr. Story asked:

> "Could it not be agreed that it be sold as a unit?"
>
> The Court: "The Personal property is of such a small amount, I think no serious difficulty would be experienced in arranging for a sale so that it can be kept together. Probably all parties would agree that would be better. I think this has been agreed all along, that it would be better, yet not an insurmountable difficulty to sell with redemption."
>
> Mr. Johnson: "I think if the Court could in its order provide that the unsecured creditors and the

one following after that, the preferred stockholders, could have the right of redemption, I think that would adequately protect their rights. * * * * * If sold for an adequate figure, they are protected; if sold for less than its value, then, of course, there is the right of redemption, which would adequately protect them." (Record, pp. 233-4.)

During this hearing it was suggested that the property should be leased for the year 1924, and that the sale should be subject to the lease, thereupon

The Court stated "you may prepare a form of decree, Mr. Story, the regular form of foreclosure decree, leaving blank such matters as I have not passed upon. The decree will reserve authority to fix an up set price."

"I assume what has been said here this morning that this is agreeable to all that this decree shall provide that the property be sold as a unit regardless of the fact that some of the property is purely personal, that if redeemed it shall be redeemed as a unit. This statement was agreed to by counsel for all parties * * * * Of course I do not want the decree enlarged beyond necessity. So far as the mode of sale is concerned, that is fixed by Statute anyway, and the decree may simply follow the Statute, but there are other things that may occur to you. * * * * (Thereupon there was some discussion with reference to the right of unsecured creditors to redeem the property. The Court then continued:) "I am not quite sure whether we can do that, I am trying to let the Statute cover the whole subject of redemption. You have a year under the Statute. If you redeem at all it would be within a year. How could I limit it to six or seven months? * * * I think perhaps the decree had better fix the status of any general creditor whose right is declared by the order as that of the lienholder. I do not recall the exact language of the

> State Statute. Perhaps you had better have that before you when you draw the decree, Mr. Story, and try to fix the status the same as any other redemptioner." (Record p. 251-2-3.)

From this discussion it is clear that the Court intended to order the property sold with the statutory right of redemption, and the hearing concluded with this understanding, at least upon the part of appellant.

We respectfully insist that the Beet Growers Sugar Company was justified in reaching this conclusion, particularly when the court said, "I am trying to let the Statute cover the whole subject of redemption. You have a year under the Statute. If you redeem at all it would be within a year." The positive instruction was given to Mr. Story to have before him the State Statute when he drew the decree, and to fix the status of those entitled to redeem, but nothwithstanding these statements, together with the abandonment of the request on the part of the trustee and the intervenor to sell the property without redemption, when the decree was finally drawn, appellant's right of redemption was not recognized and the statutory period was not allowed. It was then that the order of sale by the receiver was prepared.

Thereupon the appellant immediately prepared objections to the proposed Order of Sale by the receiver and specifically objected to the diminution of the time of redemption from that provided by the laws of Idaho, and we respectfully direct the court's attention to paragraph 2 of the objections filed. Record, pp. 133-4. The objections to the Order of Sale were followed by a petition and other objections, at which it was pointed out that

there was no necessity of selling the property at that time, for the reason that it had been rented for the 1924 season for $115,000, showing conclusively that the property was of good value, and that negotiations were then pending for refinancing the property, and the court was asked to extend the time of sale to and including the 1st day of July, 1924, and that the court fix the proper period of redemption thereafter in the event of a sale being ordered. Record, pp. 135-143.

After the sale had taken place the receiver filed his report of the sale and asked its confirmation. Thereupon objection was made to the confirmation of the sale, particularly upon the grounds:

That the appellants had been denied the statutory right of redemption, and that the Utah-Idaho Sugar Company, by reason of the Federal Trade decision, was not a competent bidder. (Record, pp. 145-207.)

CONCERNING APPELLEE'S ARGUMENT.

Several misstatements are made at page 11 of appellee's brief. Let us consider them:

It is first stated that "no final judgment has been entered in this case, and that no decree of foreclosure can be had," and the inference is that, therefore, no appeal will lie, yet the very first case cited by appellee, that of First National Bank vs. Bunting & Co., 7 Idaho 387; 63 Pac. 694, holds squarely that the order of the court confirming a receiver's sale is a final order, and that an appeal will lie.

In that case, counsel for respondent moved to dismiss the appeal on the ground that no appeal lies from an order or judgment of a court confirming a sale made by a receiver; that what is dominated as a judgment is, in legal effect, only an order, and that appeals from orders are not in harmony with the policy of the law of receivership, and that if the lower court exceeded its jurisdiction, the remedy is by Writ of Review. The court, however, says: The judgment and order appealed from made a final disposition of more than $6,000 worth of assets of the insolvent bank of Bunting & Company, and, we think, comes clearly within the provisions of Section 9 of Article 5 of the Constitution of this state, which provides that "the Supreme Court shall have jurisdiction to review upon appeal any decision of the District Court or the judges thereof.

The decision complained of, we think, is such an effectual and final disposition of a large amount of the assets of said insolvent estate as to come clearly within the provisions of said section of the Constitution, and that an appeal is the proper proceeding whereby to review the judgment of confirmation. Sub-division 1, of Section 4807, Revised Statutes, among other things, provides that an appeal may be taken to the Supreme Court from a final judgment in a special proceeding. The statutes in regard to the appointment of receivers and the case of insolvent estates is placed under the chapter concerning provisional remedies, and an order or judgment made in regard to insolvent estates which concludes the rights of the parties is appealable."

To say, therefore, that no final judgment is entered is clearly erroneous, and to state that a foreclosure of the mortgage could not be decreed is to state that the statute providing for a foreclosure is meaningless.

On page 11 counsel again repeats the statement that the receiver was appointed with the consent of appellant.

This we have heretofore shown to be untrue. He claims that the action was converted into a general receivership for the purpose of winding up appellant's affairs, and that no defense was made to these important matters. The enlarging of the receiver's powers was directly in the interest of the company. The first order of appointment made the receiver practically a custodian to care for the property of the company. By this appointment, the company was left without the right or power to operate the factory or to lease it pending the receivership and to maintain during this time the company as a going concern. It was for the purpose of protecting the property, continuing its operations, enabling the officials to effect a refinancing of the company, and to bring about a termination of the receivership, that no objection was made to the order increasing the receiver's powers. By consenting to the enlargement of the receiver's powers, it meant that for the year 1923 more than sixty thousand dollars was received as lease money, and the property was leased for the year 1924 for one hundred fifteen thousand dollars. To suggest, therefore, that because the receiver's powers were enlarged, that the company lost its right of redemption, is absurd. To urge that because objection was not made to an order enlarging the powers of the receiver deprived the company of the right to object when the company's rights under the statutes of Idaho were denied, is a process of reasoning we cannot agree to, and the case of Gila Bend Reservoir and I. Co. vs. Gila Water Co., 205 U. S. 279, cited, does not in any sense uphold any such contention. In that case it was urged that the order of sale was made in a

suit in which the receiver had not been appointed, but the record disclosed that there were two cases pending, and the court tried them as having been consolidated, and when, after sale and confirmation, the jurisdiction of the court was for the first time questioned. The court stated:

> "It is now contended that inasmuch as the question is one of jurisdiction, neither the omission to call attention to the matter in the prior litigation operates to render the decree in the case as *ris judicata* upon the question, but leaves the matter open for personal inquiry.

Counsel are mistaken in that direction. The present appellant was the defendant. The property was in the possession of the court, even if held under a receivership. The decree directed a sale. It was sold. The sale was confirmed, the deed made, and the property delivered to the purchaser. The appellant at least cannot now question the jurisdiction of the court in that suit or the title which is conveyed to the purchaser at the sale. A failure to make a defense by a party who is in court is, generally speaking, equivalent to making defense and having it overruled, * * * * and the cases not having been consolidated, it was, by counsel, contended the court had no power to order the sale," but the court answered:

> "This is tantamount to saying that the absence of formal orders by the court must prevail over its essential action.

It is clear from the record that the District Court considered the cases pending, but it at the same time considered No. 1996 as a complement of No. 1728; regarded the cases as in fact consolidated; and empowered the receiver appointed in No. 1728 to sell the property and distribute the proceeds, as directed by the decree in No. 1996."

It will thus be observed that the question in that case merely related to whether two cases had been consolidated by the court, and that the orders and decrees rendered in each case should be considered together. The court held that such was the action of the court. It had nothing to do with the question as to whether, because a receiver in a case had been appointed, the court was empowered, when a sale of the property was ordered, to deny the owner the statutory right of redemption.

Again, it is stated (Brief, p. 12), that:

> "There cannot be the slightest doubt that the sale was made as a receiver's sale."

It is true that the order directing the sale was entitled an "Order for Sale by Receiver," but whatever the designation may have been, it was in effect a foreclosure sale. The original action was based upon the default of the company in paying the interest on its bonded indebtedness. The bonds were secured by a trust deed. The trustee proceeded in accordance with the terms and provisions of this deed. It is true that subsequently the trustee and the intervenor sought to secure a sale of the property without the right of redemption to which the company was entitled. As above shown, both the trustee and the intervenor withdrew this request and consented to the sale with the right of redemption, and the court from the bench clearly indicated that a sale of that character was to be had, and directions were given to draw the decree of foreclosure in conformity with the statute. The fact, therefore, that the court entitled it an "order of sale by the receiver," and provided how the money

should be finally distributed, did not deprive the company of its rights under the trust deed. The bondholders were first protected after the payment of the necessary expenses incurred by the receivership, so whether or not the order providing for the sale of the property was headed a "foreclosure sale" or "receiver's sale" is not the vital question involved on this appeal. The question is whether the company can be deprived of its right of redemption under the Idaho statute, particularly in view of the fact that none of the parties before the court were asking for a sale without the right of redemption.

It is stated (Brief, p. 15), that:

> "Undoubtedly a receiver's sale may be made without redemption," and certain cases are cited.

Most of these cases are referred to in appellant's original brief, and it is there shown that they do not support the action of the court in the case at bar. Appellee first directs the court's attention to the case of Hewitt vs. Walters, 21 Ida. 1, 119 Pac. 705, and only the following excerpt is quoted from the opinion in that case:

> "The court had the power and jurisdiction to order that the sale be made without the right of redemption, and such order is binding on all parties to the proceedings."

This is but a general statement of the law, but in that case the decision of the lower court was affirmed upon the ground that the plaintiff had *"consented to and acquiesced in the order and decree, and is now bound thereby."*

During the course of the opinion the court cites various authorities which discuss the right and power to order receiver's sales without the right of redemption, but immediately follows the citations with the following language, at page 708:

> *"It is unnecessary, however, for us to determine that question in this case, and we reserve our judgment thereon for the reasons that the facts of this case remove it from the contingency above suggested."*

We insist that an examination of this case will show that it does not sustain or become authority for the trial court in the case at bar, to deny appellant its right of redemption.

The case of Parker vs. Decres, 130 U. S. 43, is next cited. This case does not sustain counsel's contention, but is authority in support of appellant, and was cited in its original brief. In that case Mr. Justice Harlin states:

> "In many states the right to redeem within a prescribed time after a sale under a decree of foreclosure is given in certain cases by statute. The right when thus given is a substantial one, to be recognized even in courts of the United States sitting in equity, because the statute constitutes a rule of property in the state that enacts it."

That the Idaho statute gives one year for redemption is not denied. To attempt, therefore, to argue that because there is not a specific provision authorizing a year's time to redeem from a receiver's sale, does not warrant the court in ignoring the statute that gives the year's right of redemption in foreclosure sales. If the

court possessed the power to deny the statutory right of this character, why enact the law? Is it to be suggested that when the Supreme Court states, as was done in the Decres case, that:

> "The right when thus given is a substantial one, to be recognized even in the courts of the United States sitting in equity,"

that this statement and decision is meaningless and the trial courts are not to be governed by decisions of this character?

It is next stated (Brief, p. 16) that the statute of Idaho does not give the right to redeem personal property from a sale on execution or on foreclosure, and that therefore the court was warranted in allowing the right of redemption. It must be remembered that the personal property was stated by the court to be of small value. The personal property was covered by the trust deed. It was conceded by all parties that the factory and plant was operated as a single unit, and it was stipulated that it was to be so sold. Is it to be contended that in view of these facts that because there was personal property of the value of a few thousand dollars, conceded to be a part of the working plant of the company, that appellant should lose its right of redemption for property covered by the trust deed that aggregated more than a million dollars?

The case of Carson vs. Allegheny Window Glass Co., 189 Fed. 791, is cited. This case, however, does not involve the question of a sale of property without redemption. The principal question there discussed is: will the

court appoint a receiver of a solvent corporation at the request of a minority stockholder? The court discusses generally this question, and says:

> "Special and exigent circumstances may, in the absence of a statute, warrant and justify a receivership of a corporation, although solvent, for the purpose of winding up its affairs and distributing its assets, or of temporarily taking charge of and protecting its property and managing its business and affairs. If it has become impossible for the corporation to answer any of the ends of its creation, and it has thus utterly failed of its purpose, a court of equity would, under its general jurisdiction and powers, and wholly aside from any statutory provision in that behalf, be authorized to wind up its business and affairs for the benefit of those interested, namely: its creditors and stockholders, although not involving a dissolution or termination of the corporate franchise."

From the foregoing, it will be seen that the question as to whether the court has the power to deny the statutory right of redemption is in no sense involved, and does not afford the court any aid in determining the questions now before it.

To attempt to justify the action of the trial court, counsel for the appellee suggests (Brief, p. 17) that in this case the appellant does not even answer the description of a judgment debtor, nor are there any creditors having a lien by judgment or mortgage on the property sold subsequent to that on which the property was sold, and that the property was not sold to satisfy any lien or encumbrance against it. We earnestly insist that this statement is untrue. The court, by its various orders, fixed and determined the amount due the bond-

holders and the other creditors. By its orders it determined the priorities of these claims, and the order in which they were to be paid from the proceeds of the mortgaged property which was being sold in the action brought for the purpose of foreclosing the lien created by the trust deed. These orders constituted in effect a judgment. It was a judgment against the Beet Growers. Sugar Company, and, as heretofore shown in the Bunting case, the order confirming the sale of the property was a final judgment, from which an appeal would lie.

Attention is called to the case of Pac. N. W. Packing Co. vs. Allen, 116 Fed. 312, suggesting that this case holds that there is no right of redemption from the sale of personal property. This decision, as pointed out in our original brief, is based upon the fact that the corporation involved was of a public or quasi-public character, and that the entire interest of the appellant was mortgaged, including all of the interest of the mortgagor in certain piling, roadways and approaches to a wharf which connect the structures with the upland, and that the case fell within the reasons assigned in the Railway cases for not following the statutory provisions for redemption. In other words, this case recognized the public or quasi-public nature of a property mortgaged, and held that the case fell within the rule announced in the Railway cases. It did not attempt in any manner to overrule the case of Bryne vs. Insurance Co., 96 U. S. 627.

The case of State vs. Stephens (206 Pac. 1094) is cited apparently upon the proposition that the statutory right to redemption is not property, but a bare personal priv-

ilege. Whether the statutory right to redemption is property or a personal privilege is wholly immaterial. This question is not involved. The case cited merely construes the Montana statute. It held that the judgment debtor did not redeem within the time allowed by law and that the right of redemption was a personal privilege to him and not a property right upon which an execution or an attachment could be levied. In other words, he not having exercised his right to redeem under the law, his creditor could not attach this privilege. We submit that it needs no discussion to show that this case has no bearing upon the matters under discussion.

The case of Morrison vs. Burnette (154 Fed. 617) does not involve the question of the right of redemption, but relates merely to the proposition that in a proper receiver's sale the purchaser bids with full knowledge that the sale to him is subject to confirmation by the Court, and that the Court has the right to exercise certain judicial powers in respect to confirming the sale. This case does not consider the question of the right or power of the court to disregard the statutory right of redemption and order a receiver's sale, thereby depriving the mortgagor of his statutory right of redemption.

The case of Watkins vs. Minnesota Thresher Mfg. Co. (41 Minn. 150) is cited upon the proposition that the right of redemption is not incident to a sale by a receiver of an insolvent corporation. This case, however, recognizes the very rule for which appellant contends; that is, that the right of redemption exists by force of statute, and does not exist where there is simply a general statute authorizing a receiver to take property and

hold it in *custodia legis* for the purpose of paying the debts of an insolvent corporation.

The court held that under the particular circumstances the party there seeking to redeem did not fall within the class provided for by the statute; in other words, the case recognizes the right to redeem, but only in accordance with the provisions of the statute. This case does not hold that the court has the right to refuse to grant the right of redemption provided for in the statute and to substitute therefor a receiver's sale denying this right.

The case of Owen vs. Kilpatrick (11 So. 476) is cited without comment. This case merely holds that only those authorized by statute may redeem; that it is a statutory right, and those seeking to exercise it must fall within this right.

We insist that this is the law and that when one does fall within the proper class, the court has no right to deny the benefits of a statutory provision.

The court's attention is directed to the case of Corless vs. Clinton (Michigan), (180 N. W. 478), and the companion case of Bank of Commerce vs. Corless (186 N. W. 717).

In the former an application was made for the appointment of a receiver for the Waterloo Creamery Company. The action was based upon certain promissory notes unsecured. The defendants moved to dismiss. This motion was denied. Later objections to the appointment of the receiver were made and affidavits filed in support thereof, and testimony having been taken

from which it appeared that the company was indebted in large sums, was unable to pay for the milk being furnished by the farmers, that if the plants were closed down and allowed to remain idle for any considerable length of time the herds from which milk was secured would be dissipated and the milk derived therefrom would seek other outlets, that if at a later day the plants were reopened that it would be difficult, if not impossible, to secure a supply of milk, and that the plants were worth as a going concern at least double the amount they would be worth if closed down indefinitely. The court held upon the showing made that in the exercise of its equity powers it had the right to appoint a receiver. On appeal it was contended that the court was without authority to appoint a receiver prior to a full hearing and final decree. This contention was overruled, the court holding that it was within its discretion as to whether a receiver should be appointed. The question of the right of redemption was not considered in the first case.

In the latter case it was contended, first, that the court had no power to appoint a receiver of the real estate and the income thereof, and, second, that the sale, if one is to be had, should be a foreclosure sale. The Supreme Court held that the decision of the court first rendered, refusing to dismiss the application for the appointment of a receiver, was correct. Upon the second proposition the court states that "the argument was made that if a sale is to be made it should not be a short sale without redemption, but a foreclosure should be had analogous to that of a mortgage. The evidence shows that the property in suit as a going concern is worth

upwards of $100,000.00. The property is an admixture of real property, personal property and intangible values arising out of the milk routes and patronage of the farmers. It appears in evidence that if the milk routes were eliminated, as they would be if any considerable interruption took place, the farmers would find other outlets for their milk, and with the loss of this patronage the entire property would depreciate in value 50%.

It was further found that the defendants were insolvent. It will be noted from the foregoing that the property was not under mortgage, no suit had been commenced seeking to foreclose any mortgage or trust deed given as security for the notes of the company. The case was simply that of a general receivership. The question of the statutory right of redemption was not involved. The court held that "in view of the character of the property involved makes it an exception to the general rule that real estate must be followed by a period of redemption. * * * * The court then quotes Cyc. as follows: "It has been held that a law providing a right of redemption from sales of real estate does not cover the case of a sale of the entire property of a quasi-public corporation, such as a railroad or a water company, including its real and personal property and franchise, but such sale may be made as an entirety without redemption." It then cites the case of Hammock vs. Farmer (105 U. S. 77), and Pacific N. W. Packing Co. vs. Allen (116 Fed. 312). In other words, the court invokes the modified rule of the United States Court that where a quasi-public corporation is involved or where franchises relating to canals, telegraph, telephone, electric light,

gas, water plants and railroad are involved, that the property may be sold without the right of redemption. All of these decisions, however, are based upon the public character of the property involved, and particularly as the same relate to franchise. No statute in the State of Michigan is quoted, no mortgage was involved, and the principal property owned by the insolvent company was intangible in character and arose out of milk routes and the patronage of farmers.

This is the nearest case in point which counsel have been able to direct the court's attention to, and we submit that this case does not overcome or supplant the rule adopted by the Supreme Court of the United States in the case of Brine vs. Insurance Company, heretofore referred to, nor does this case meet the law as announced by the Supreme Court of Illinois in the case of Locey Coal Mines vs. Chicago W. & V. Coal Co. (22 N. E. 503).

It is urged that the case of Blair vs. Ill. Steel Co. (59 Ill. 350) modifies the decision in the Locey Coal case. The decision in the Blair case, however, recognizes that the Locey decision was based on the Illinois statute, which expressly gives the right of redemption to all sales of real estate by virtue of an execution, judgment, or decree of foreclosure of a mortgage. It specifically states that the sale was ordered in a decree rendered upon a creditors bill to enforce the collection of a judgment at law for the payment of money, but in the Blair case there was no decree of foreclosure or sale under a trust deed. The Blair case does not even modify the decision in the Locey case, but specifically recognizes the rule there announced, and it will be found upon examination

that the statute of Illinois which was involved was almost identical with the Idaho statute, so that the Blair case in no manner modifies the rule for which we contend.

The case of Continental Bank vs. Corey Bros. (208 Fed. 976) involves principally the question as to whether liens took priority over certain trust deeds. In that case an action was brought to foreclose a mechanic's lien on an irrigation system, and the court decreed a sale of the entire system without the right of redemption, but because it appeared that the property subject to the lien was so blended and reciprocal in its use that to divide it and sell each part separately would destroy or greatly impair its value, to the serious detriment both of the public and private interests. The property involved related to irrigation works constructed under the Carey Act. It involved an entire irrigation system, with rights of way, various franchises, and other property, and the court held that the rule invoked in the case of Pacific N. W. Packing Co. vs. Allen should apply. The decision is based entirely on the character of the property.

To the same effect in the case of Title Insurance and Trust Co. vs. California Dev. Co. (152 Pac. 542). This was another irrigation project and involved the public and the right to use water in the State of California and in the Republic of Mexico. This decision is also based upon the particular character and nature of the property; it involved franchises and various intangible assets which would be without value segregated from the main enterprise.

We therefore respectfully insist that an examination of the authorities quoted and relied upon by the appellee do not warrant the court in denying to appellant its statutory right of redemption.

Counsel is again in error in suggesting that the court in the drawing of its order and providing for a $15,000.00 penalty saved the company in the event it redeemed the property $51,000.00. Under counsel's own contention six months time was allowed for redemption; 10% interest for that period would amount to $40,000.00, to which was added a penalty of $15,000.00, or a total in all of $55,-000.00, instead of $29,000.00, as computed by counsel for the appellee.

CONCERNING FEDERAL TRADE DECISION.

No attempt has been made by the appellee to answer the suggestions contained in appellant's brief insofar as it relates to the Utah-Idaho Company being a competent bidder. The discussion of counsel upon this subject in effect confesses the validity of the Federal Trade Act and the rightfulness of the decision quoted in construing this Act. If the Act means anything, can it be said that the Utah-Idaho Sugar Company, having been found guilty of a conspiracy to wreck the Beet Growers Sugar Company, should then have the right to take advantage of its own wrong and become a purchaser at a forced sale of the Beet Growers property, which was in effect brought about through its unlawful acts?

We assert again that the Utah-Idaho Company only attempted to appeal from the decision of the Federal Trade Commission after objections were made to its competency as a bidder for the Beet Growers property. No authorities are cited showing that time for appeal has been extended or that the usual six months rule does not prevail. The question and suggestion that the purchasing of the property was only an intra-state matter and has nothing to do with interstate commerce, and that the Federal Trade Commission was entirely without jurisdiction in the matter, is nothing but a rehash of the contention made by the Utah-Idaho Company in its proceedings before the Federal Trade Commission, but which were wholly disregarded.

We insist that this Honorable Court should give full force and effect to the decision of the Federal Trade Commission, and by so doing protect the Beet Growers Sugar Company from the wrongful acts perpetrated against it from its very organization by the Utah-Idaho Sugar Company.

We respectfully ask for a reversal of this cause.

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